



**Billing Code 4210-67**

**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

**[Docket No. FR-5735-N-05]**

**Home Equity Conversion Mortgage (HECM) Program: Mortgagee Optional Election Assignment for Home Equity Conversion Mortgages (HECMs) with FHA Case Numbers assigned prior to August 4, 2014 – Response to Comments**

**AGENCY:** Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

**ACTION:** Notice; Response to Comments.

**SUMMARY:** On February 6, 2015, at 80 FR 6743, the Federal Housing Administration (FHA) published a notice to solicit public comment on the alternative path to claim payment—the Mortgagee Optional Election Assignment—for certain HECMs announced in Mortgagee Letter 2015-03. The public comment period on the February 6, 2015, notice closed on March 9, 2015. FHA received 7 public comments on the notice. In this notice, FHA responds to questions and comments raised by commenters.

**FOR FURTHER INFORMATION CONTACT:** Ivery Himes, Director, Office of Single Family Asset Management, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW, Room 9172, Washington, DC 20410; telephone number 202-708-1672 (this is not a toll-free number). Persons with hearing or speech impairments may access this number by calling the Federal Relay Service at 800-877-8339 (this is a toll-free number).

**SUPPLEMENTAL INFORMATION:**

**I. Background**

FHA has a statutory obligation to ensure the fiscal soundness of the FHA insurance funds. FHA also has the ability, pursuant to the Reverse Mortgage Stabilization Act of 2013 (Public Law 113-29), to establish, by notice or mortgagee letter, any additional or alternative requirements that the Secretary, in the Secretary's discretion, determines are necessary to improve the fiscal safety and soundness of the HECM program, which requirements shall take effect upon issuance.

Pursuant to this authority, FHA established Mortgagee Letter 2015-03 on January 29, 2015, for immediate effect. In Mortgagee Letter 2015-03, FHA set out the Mortgagee Optional Election (MOE) Assignment path to claim payment for existing HECMs with FHA Case Numbers issued prior to August 4, 2014. FHA alerted mortgagees that aside from the present procedures for either the sale of the home or foreclosure of the HECM in accordance with the mortgage insurance contract terms as originally endorsed, or the MOE Assignment alternative, no other path to claim payment exists for HECMs with FHA Case Numbers issued prior to August 4, 2014.

## **II. Discussion of the Public Comments Received on the February 6, 2015, Notice**

On February 6, 2015, at 80 FR 6743, FHA published a notice in the Federal Register to solicit public comment on the HECM program changes announced in Mortgagee Letter 2015-03. FHA received 7 public comments on the notice. Comments were submitted by a HECM servicer, a national reverse mortgage association, legal aid and advocacy organizations, and other interested parties. In general, some commenters applaud and support FHA's efforts to preserve the integrity of the insurance funds in order to ensure the continued viability of the HECM program, while providing protections to Non-Borrowing Spouses of deceased HECM borrowers. However, commenters seek clarification on many policy and systems issues, and ask FHA to

consider alternative options. In this notice, FHA takes the opportunity to respond to the public comments and provide clarifications to facilitate implementation.

**A. Technical Comments and Clarifications Necessary for Implementation**

Comment: Extend the implementation period and foreclosure timeframe or institute a moratorium until FHA has addressed industry comments and provided systems support for the policy changes.

HUD Response: HUD does not believe that a delay in implementation is needed or advisable at this time, nor is there a need for any moratorium. System changes are in progress and will be available before June 1, 2015, which is the date that assignments made pursuant to Mortgage Letter 2015-03 will begin to be accepted by HUD. Additionally, HUD believes that any further delay in implementation has the potential to negatively impact Non-Borrowing Spouses because interest will continue to accrue during such delays, resulting in an increase in the outstanding principal balances and the potential for such balances to exceed the amount permissible in connection with MOE Assignments.

Comment: Clarification needed regarding notification to HUD. Commenter questions whether the notification to HUD is only required if the mortgagee is opting to utilize the MOE Assignment, or the mortgagee must notify HUD of their election or non-election of the MOE Assignment in all instances when the HECM has been called due and payable as a result of the death of the last remaining borrower.

HUD Response: The mortgagee must notify the Secretary in HERMIT: (1) when it elects to proceed to foreclosure instead of utilizing the MOE Assignment made available by Mortgage Letter 2015-03; (2) when it elects to utilize the MOE Assignment made available by the

mortgagee letter; and (3) when, after it elects to proceed with the MOE Assignment, it determines that a HECM or a surviving Non-Borrowing Spouse is ineligible.

Comment: Clarification needed regarding the availability of extensions and the process for obtaining them. Commenter questions whether or not HUD will offer extensions of additional time beyond the 90 days from the HECM borrower's death in order for the Non-Borrowing Spouse to obtain good, marketable title to the property, or otherwise establish a right to occupy the property. If so, commenter asks HUD to clarify how a servicer requests an extension, and suggests that HERMIT is the appropriate manner to request an extension.

HUD Response: HUD would like to confirm that Mortgagee Letter 2015-03 does not require a surviving Non-Borrowing Spouse to obtain legal title to the mortgaged property in order to qualify as an Eligible Surviving Non-Borrowing Spouse. A surviving Non-Borrowing Spouse must obtain either legal title to the mortgaged property or some other legal right to remain within 90 days of the death of the last surviving borrower. Where a surviving Non-Borrowing Spouse is unable to obtain legal title, the surviving Non-Borrowing Spouse must be able to establish some other legal right to remain in the mortgaged property. Any extensions to any of the timeframes stated in Mortgagee Letter 2015-03 are at the sole discretion of the Secretary. Any extension request must be made in writing, before the expiration of the initial timeframe, and must show good cause.

Comment: Clarification needed regarding the effect of extensions on curtailment. Commenter asks HUD to clarify whether or not an extension, provided that HUD allows for

extensions in order to afford a Non-Borrowing Spouse an extension of time to obtain good, marketable title to the property, will cause curtailment to a mortgage insurance claim.

HUD Response: HUD would like to again confirm that Mortgagee Letter 2015-03 does not require a surviving Non-Borrowing Spouse to obtain legal title to the mortgaged property in order to qualify as an Eligible Surviving Non-Borrowing Spouse. A surviving Non-Borrowing Spouse must obtain either legal title to the mortgaged property or some other legal right to remain within 90 days of the death of the last surviving borrower. Where a surviving Non-Borrowing Spouse is unable to obtain legal title, the surviving Non-Borrowing Spouse must be able to establish some other legal right to remain in the mortgaged property.

Additionally, Mortgagee Letter 2015-03 implements an alternative Due Date for HECMs eligible under Mortgagee Letter 2015-03. Any extensions to any of the timeframes stated in Mortgagee Letter 2015-03 are at the sole discretion of the Secretary. Any extension request must be made in writing, before the expiration of the initial timeframe, and must show good cause. Where an extension request is received and granted in writing, it will operate in the same manner as approved extensions currently operate.

Comment: Clarification needed regarding who is responsible for the costs of any title searches. Commenter asks HUD to clarify who is responsible for the cost of the title search to verify good, marketable title has been obtained by the Non-Borrowing Spouse. Commenter asks whether or not this expense can be charged to the loan and thus be reimbursed to the mortgagee through the claims process. Commenter asserts that HERMIT will not allow an assignment of a loan to HUD that contains post due and payable expenses.

HUD Response: HUD appreciates the opportunity to provide this clarification. HECM proceeds are not available after the death of the last surviving borrower. As such, HECM

proceeds may not be used to cover any additional expense that may be incurred during the MOE Assignment process. Any costs or expenses must be paid outside of the HECM loan and will not be reimbursed in HUD claims.

Mortgagee Letter 2015-03 does not place any restrictions or requirements on the source of funds to pay for any additional expenses that may be incurred. Similarly, Mortgagee Letter 2015-03 places no restrictions or requirements on the manner in which an outstanding loan balance may be brought into compliance with the Principal Limit Test.

Comment: Documentation of a common law marriage should be established by the Non-Borrowing Spouse through a letter from legal counsel or an affidavit of the Non-Borrowing Spouse, and the servicing mortgagee should be able to rely on that documentation.

HUD Response: HUD appreciates the comment; however, HUD has determined not to make changes to the documentation requirements of Mortgagee Letter 2015-03. Mortgagee Letter 2015-03 requires the mortgagee to provide either a Marriage Certificate, a legal opinion certifying the validity of the marriage, or other evidence sufficient to establish the legal validity of the marriage. An affidavit from a Non-Borrowing Spouse is sufficient evidence of cohabitation or other purely factual circumstances but is not sufficient to demonstrate the legal effect of that cohabitation or those other circumstances to create a common law marriage under applicable law. Where an affidavit is used, a mortgagee would also need to provide documentation that applicable state law recognizes common law marriage and that the facts recited in the affidavit sufficiently establish a valid marriage meeting all of the requirements of Mortgagee Letter 2015-03. Again, Mortgagee Letter 2015-03 places no restrictions on the source of funds used to obtain any requisite legal opinion.

Comment: Clarification needed regarding the availability of the 95% payoff to a Non-Borrowing Spouse on title to the property at the time of the death of the borrower.

Commenter notes that the Eligible Surviving Non-Borrowing Spouse may elect to satisfy the HECM loan and retain the property for the lesser of the unpaid principal balance of the loan or 95% of the property's appraised value, and asks whether or not that 95% payoff is available to the Non-Borrowing Spouse even if the Non-Borrowing Spouse is on title to the property at the time of the death of the borrower.

HUD Response: HUD confirms that, as provided in Mortgagee Letter 2015-03, any heir including a Non-Borrowing Spouse who is on title to the property may satisfy the HECM and retain the property for the lesser of the outstanding loan balance or 95% of the property's appraised value. In the case of purchases financed in part by a new HECM, 24 CFR 206.53 will apply.

Comment: Clarification needed regarding whether or not HUD will provide mortgagees an extension to the time period in which they must make and notify HUD of the MOE Assignment election.

HUD Response: HUD appreciates the opportunity to provide certain clarifications through this Federal Register notice. As a result, HUD is providing mortgagees with an extension following the publication of this notice of the timeframe in which mortgagees must notify HUD of their election where the borrower had already died as of the date of publication of this notice. Thus, mortgagees must make their election within the later of 120 days of the issuance of Mortgagee Letter 2015-03 or 30 days after the servicer receives notice of the last surviving borrower's death. Any additional extension to this timeframe is at the sole discretion of HUD. Any additional extension request must be made in writing, before

the expiration of the initial timeframe or within ten days of the mortgagee's discovery of the surviving Non-Borrowing Spouse, and must show good cause. The good cause shown for any such request must include a cogent explanation of why the surviving Non-Borrowing Spouse was not discovered sooner and could not have been discovered sooner with the exercise of reasonable diligence.

Comment: Clarification needed regarding how loan documents could be modified when the person(s) who executed those documents are deceased. Commenters note that the person(s) who executed the loan documents would be deceased and it is unclear how such a loan contract could be modified after a party to the contract is deceased. One commenter requests that HUD not use the term "modification" since it has a precise legal meaning. Commenters request clarification from HUD as to how the loan documents may be modified and documented, and seek other options to achieve HUD's intention in this section, suggesting the possibility of a loan assumption or tolling agreement. Finally, the commenter asks, where the requirements may result in additional third party expenses, whether those expenses may be reimbursable through either the assignment claim or other claim type if it is determined that the loan is not eligible for a MOE Assignment.

HUD Response: HUD would like to confirm that Mortgagee Letter 2015-03 does not require a mortgagee to modify the loan documents. However, as stated in Mortgagee Letter 2015-03, in order to perfect an assignment claim, a mortgagee must be able to certify that it is, in fact, assigning a valid, legally enforceable first lien. The mortgagee must take whatever steps it deems necessary to ensure that its certification is truthful, which may or may not include modifying the loan documents, depending on the circumstances and on state law. Once again,



Mortgagee Letter 2015-03 places no restrictions on the source of funds used to obtain any requisite documentation or to fulfill any requisite conditions.

Comment: Clarification needed regarding the timing of the HERMIT system upgrades.

HUD Response: The HERMIT release to accommodate the requirements of Mortgagee Letter 2015-03 will occur prior to the June 1, 2015, date indicated in the mortgagee letter.

Comment: Clarification needed regarding whether the HERMIT system upgrades will include functionality to accept a MOE Assignment of the case if the last remaining borrower passes away prior to the case reaching 98% of the Maximum Claim Amount (MCA).

HUD Response: The HERMIT system updates will include functionality necessary to accept a MOE Assignment of the case if the last remaining borrower passes away prior to the case reaching 98% of the MCA. Any assignment under the MOE Assignment must be initiated within 90 days from the MOE Assignment election or within 180 days of the publication date of Mortgagee Letter 2015-03, whichever is later.

Comment: Clarification needed regarding whether or not MOE Assignments can be made when the unpaid principal balance exceeds 100% of the MCA.

HUD Response: HUD would like to confirm that, as stated in Mortgagee Letter 2015-03, in order for a HECM to be eligible for a MOE Assignment, the outstanding loan balance may not exceed the MCA. A HECM with an outstanding loan balance greater than the MCA may become eligible, provided that the outstanding loan balance at the time of assignment does not exceed the MCA and all other conditions and requirements for a MOE Assignment are met.

Comment: FHA's servicing contractor, NOVAD, should be equipped and trained to approve requests for assignment quickly when the MOE Assignment election is utilized, as

servicers are only given 90 days to determine eligibility, gather additional documents, potentially modify the loan, and assign the claim to HUD.

HUD Response: HUD appreciates the comment. HUD's loan servicing contractor is receiving the necessary information in order to review assignment requests pursuant to Mortgagee Letter 2015-03. This review will include an examination of the applicable timeframes, the initiation process, and all required documentation.

Comment: Clarification needed regarding the calculation of the current principal limit for the Non-Borrowing Spouse. Commenters ask whether or not the calculation of the current principal limit for the Non-Borrowing Spouse should include the calculated growth to the principal limit and seek clarification as to how mortgagees should apply funds in cases where a payment may be used to reduce the unpaid principal balance. Commenters seek examples of such "pay down" scenarios and the specific transaction code in HERMIT that should be used.

HUD Response: As stated in Mortgagee Letter 2015-03, there are two different tests that are applicable and only one of the tests must be satisfied in order for a HECM to be eligible for a MOE Assignment. The two tests are the Factor Test and the Principal Limit Test. The Factor Test compares what the principal limit factor (PLF)<sup>1</sup> would have been at origination had the Eligible Surviving Non-Borrowing Spouse been a borrower. If the Eligible Surviving Non-Borrowing Spouse's PLF would have been greater than or equal to the deceased borrower's PLF at origination, the test is satisfied. The Factor Test does not take into consideration the growth of the principal limit.

The Principal Limit Test does take into account the calculated growth. The growth must be calculated by using what the PLF, in addition to the initial principal limit, would have been

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<sup>1</sup> Principal Limit Factor tables are available here:  
[http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/housing/sfh/hecm](http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/hecm).

had the Eligible Surviving Non-Borrowing Spouse been a borrower at origination. In order to satisfy the Principal Limit Test, the outstanding loan balance must be equal to or less than what the principal limit would have been for the Eligible Surviving Non-Borrowing Spouse at the time the loan became due and payable due to the death of the last surviving borrower. Mortgagee Letter 2015-03 does not place restrictions or requirements on the source of funds that may be used to bring the outstanding loan balance in compliance with the Principal Limit Test. Additionally, Mortgagee Letter 2015-03 places no restrictions or requirements on the manner in which an outstanding loan balance may be brought into compliance with the Principal Limit Test. There will, however, be no new transaction codes in HERMIT.

Comment: Clarification needed regarding whether or not a mortgagee may pay down the balance of a HECM loan in order to allow a Non-Borrowing Spouse to meet the Principal Limit Test. Commenter notes that under current practice, HUD will not accept a 98% Assignment if the mortgagee has paid taxes or insurance on behalf of the borrower, and seeks clarification regarding whether these restrictions will apply under Mortgagee Letter 2015-03. Commenter asks HUD to confirm whether or not they will accept MOE Assignments when (1) the mortgagee has contributed amounts toward the PLF Pay Down; (2) the mortgagee has contributed amounts to satisfy taxes, insurance, Home Owners Association fees and condominium assessments due and paid at any time prior to completing a MOE Assignment; and (3) the mortgagee has contributed amounts to satisfy attorney fees, court costs, appraisal fees, inspection fees, etc., incurred by the mortgagee prior to completing the MOE Assignment.

HUD Response: Mortgagee Letter 2015-03 does not place restrictions or requirements on the source of funds that may be used to bring the outstanding loan balance in compliance with the Principal Limit Test. Additionally, Mortgagee Letter 2015-03 places no restrictions or

requirements on the manner in which an outstanding loan balance may be brought into compliance with the Principal Limit Test. The mortgagee letter does, however, require that the outstanding loan balance be less than the MCA and that either the Factor Test or Principal Limit Test is satisfied.

Comment: Because all states generally have a statute of limitations for mortgage foreclosures or collecting or realizing on a mortgage loan, the use of a document by a mortgagee with a Non-Borrowing Spouse, such as a tolling agreement, should be a qualifying attribute for the Non-Borrowing Spouse to make a HECM loan eligible for a MOE Assignment.

HUD Response: In order to perfect a MOE Assignment claim, a mortgagee must be able to certify that it is, in fact, assigning a valid, legally enforceable first lien that will remain valid and legally enforceable throughout the lifetime of the Eligible Surviving Non-Borrowing Spouse. The mortgagee must take whatever steps it deems necessary under the laws of the jurisdiction in which the property is situated to ensure that its certification is truthful, which may include obtaining a tolling agreement.

Comment: Clarification needed regarding meaning of “judicially resolved”. Commenter asks if the judgment must be entered in the mortgagee's favor, or if a dismissal with prejudice would be sufficient. Commenter also requests clarity regarding whether HUD is requiring or expecting that the Non-Borrowing Spouse will sign a release or waiver for these instances.

HUD Response: HUD appreciates the opportunity to address this concern. Mortgagee Letter 2015-03 requires a mortgagee to provide documentation that supports an affirmation that no allegations that would invalidate the HECM mortgage exist or if there were such allegations, evidence of their judicial resolution in favor of the mortgagee. A dismissal with prejudice would

suffice for evidence of a judicial resolution in favor of the mortgagee. A judicially approved settlement of all claims against the mortgagee would also suffice. Mortgagee Letter 2015-03 does not require a surviving Non-Borrowing Spouse to sign a release or a waiver. However, a mortgagee is required to certify that it is, in fact, assigning a valid, legally enforceable first lien. The mortgagee must take whatever steps it deems necessary to ensure that its certification is truthful.

Comment: Clarification needed regarding reinstatement of a MOE Assignment Deferral Period.

HUD Response: Where an obligation under the terms of the mortgage has not been met prior to completion of a MOE Assignment, the MOE Assignment Deferral Period ceases and the HECM is not eligible for a MOE Assignment unless and until the MOE Assignment Deferral Period is reinstated. Thus, where a missed obligation is subsequently cured, the MOE Assignment Deferral Period may be reinstated and the MOE Assignment process may proceed.

Comment: HUD should provide examples of the required certifications and other timeframes.

HUD Response: HUD confirms that model language for the required certifications was provided in the text of Mortgagee Letter 2015-03 and remains valid for use in connection with a MOE Assignment.

Comment: Clarification needed regarding First Legal Due Date.

(a) Commenter seeks clarification as to whether or not a mortgagee's reporting requirements of the election to take a MOE Assignment extend all of the current HECM servicing reporting timelines that impact claim curtailment, including but not limited to undertaking and reporting first legal action or ordering a due and payable appraisal. Commenter also requests that

these adjusted timelines be automatically captured in HERMIT, thus avoiding an auto-curtailement in HERMIT which would further necessitate retrieving the curtailment on a supplemental claim.

Commenter asks HUD to clarify that the “Due Date” for purposes of payment of claim means the date when a mortgagee notifies HUD under Mortgagee Letter 2015-03 that it has determined not to utilize the MOE Assignment, or, if applicable, that it has elected the MOE Assignment but then determined that the mortgage is not eligible for assignment because all established conditions and requirements for the MOE Assignment are not met, and that this timeline applies to all curtailable events.

HUD Response: The Due Date for purposes of payment of claim means the date when a mortgagee notifies HUD that it has determined not to utilize the MOE Assignment, or, if applicable, that it has elected the MOE Assignment but then determined that the mortgage is not eligible for assignment because all established conditions and requirements for the MOE Assignment are not met. All subsequent required timeframes are determined in relation to this Due Date. HUD would like to reiterate mortgagees that any election made pursuant to Mortgagee Letter 2015-03 must be made within the later of 120 days of the issuance of Mortgagee Letter 2015-03 or 30 days after the servicer receives notice of the last surviving borrower’s death. As such, where a mortgagee does not elect to utilize the MOE Assignment, and instead elects to proceed in accordance with the HECM documents, the Due Date may not exceed the later of 120 days of the issuance of Mortgagee Letter 2015-03 or 30 days after the servicer receives notice of the last surviving borrower’s death, as provided in that mortgagee letter.

(b) Commenter asks HUD to clarify that, following the election of the MOE Assignment and the assessment and determination that a Non-Borrowing Spouse is ineligible for a MOE Assignment Deferral Period, the timeline for First Legal Action is automatically extended, in

addition to any additional time that may be allowed by the Secretary, beyond this automatically extended time period. Commenter requests that HUD clarify the manner in which a servicing mortgagee should update HERMIT with this information to avoid a claim being automatically curtailed to the date six months from the death of the last surviving borrower. Commenter also requests that HUD clarify which dates should be provided for the date the servicing mortgagee notified HUD of the death (Block 29) and the expiration of the extension (Block 19) in such cases in order to avoid curtailment.

HUD Response: Under Mortgagee Letter 2015-03, where a mortgagee elects the MOE Assignment and subsequently determines that either the HECM or the surviving Non-Borrowing Spouse is not eligible for a MOE Assignment, the Due Date for claim purposes is considered to be the date that such a determination was made. All subsequently required timeframes, including the timeframes regarding First Legal Action, are determined in relation to the Due Date.

The User Assistance Test (UAT) for the HERMIT changes will occur in Spring 2015, as the scheduled release date is targeted for April 25, 2015. The process expected to be in effect at that time is as follows: To change the “Due Date” in HERMIT, the User will access the “Contact Tab” and un-check the “Eligible NBS” box, causing the Due & Payable without HUD Approval Timeline to be created, with a reason of “Death”. The loan status will be updated to “Due & Payable” and the date the box is un-checked will become the new “Due Date”.

(c) Commenter requests clarification regarding the time period for commencement of First Legal Action for loans which previously had extensions but are now under the time periods provided in Mortgagee Letter 2015-03. Commenter notes that there are many cases that have been on a Non-Borrowing Spouse extension and questions whether First Legal Action for these

loans restarts as of Mortgagee Letter 2015-03. When must First Legal Action be completed to avoid interest curtailment?

HUD Response: As provided in Mortgagee Letter 2015-03, all extensions provided by FHA Info 14-34 have expired. No further extensions are permissible under FHA Info 14-34. Mortgagees must proceed in accordance with the timeframes established in Mortgagee Letter 2015-03.

Comment: Clarification needed regarding whether or not a HECM loan will be eligible for a MOE Assignment Deferral Period if the Non-Borrowing Spouse files for bankruptcy protection. Commenter also seeks clarification as to whether the MOE Assignment eligibility will be delayed until after the bankruptcy petition or procedure is dismissed (similar to the requirement to complete First Legal Action in 24 CFR 206.125(d)(2)) or whether a Non-Borrowing Spouse that files for bankruptcy is ineligible for the MOE Assignment unless the bankruptcy is dismissed within the stated guidelines.

HUD Response: HUD would like to clarify that the outstanding loan balance of a HECM is not a debt owed by a non-borrower. Only a borrower is obligated to satisfy a HECM. Further, a HECM is a non-recourse loan and as such, no borrower, or borrower's estate, is personally liable for any amounts that may exceed the proceeds received from the subsequent sale of the mortgaged property. Further, any amount that may be required to bring the outstanding loan balance of a HECM in compliance with the Principal Limit Test, in order to be eligible for a MOE Assignment, is similarly not a debt owed by a non-borrower. Thus, any such amount cannot be included as a debt owed by a Non-Borrowing Spouse filing for bankruptcy. To the extent a mortgagee believes that the automatic stay provision may apply, the mortgagee may take whatever steps it deems necessary to ensure that communication with the Non-Borrowing



Spouse would not violate the automatic stay. Regardless, a mortgagee must make its election within the later of 120 days of the issuance of Mortgagee Letter 2015-03 or 30 days after the servicer receives notice of the last surviving borrower's death, whichever is later. As also stated in Mortgagee Letter 2015-03, any extension to this timeframe is at the sole discretion of HUD.

Comment: FHA should consider initiation of the assignment to occur when the loan is uploaded for selection in HERMIT.

HUD Response: HUD considers assignment initiated when a complete assignment request is uploaded in HERMIT. A complete assignment request includes all of the required documents identified in Mortgagee Letter 2015-03.

## **B. Additional Options and Other Comments**

Comment: Voluntary nature of the MOE Assignment is problematic. Commenters note that the MOE Assignment election is left to the discretion of the mortgagee, and mortgagees are unlikely to select that option. One commenter specifically notes that the lack of guidance and clarity, coupled with the fact that lenders must indemnify HUD for any errors, make lenders unlikely to exercise the MOE Assignment option.

HUD Response: As stated in Mortgagee Letter 2015-03, HUD cannot interfere with the private contractual rights retained by the mortgagees. Further, as the mortgagee is the party to the contract of insurance, it is solely within the discretion of the mortgagee whether to elect to amend its contract of mortgage insurance under the MOE Assignment or to proceed in accordance with the loan documents as endorsed. Currently, for any claim for insurance benefits filed by a mortgagee, mortgagees are subject to unwinding of a filed claim where the conditions for that claim have not been met. This typical requirement is extended to the MOE Assignment just as it would be on an ordinary assignment or claim.

Comment: MOE Assignment is not an adequate alternative to foreclosure and HUD should provide alternative relief. Commenters state that by requiring the Non-Borrowing Spouse to meet the Principal Limit Test in order to qualify for assignment of the loan, HUD is putting forth an option that the majority of surviving Non-Borrowing Spouses cannot benefit from. Commenters identify the uncertainty with calculating the PLF and growth rate, the cost of reducing the principal balance, and the short deadline by which the Non-Borrowing Spouse must meet the Principal Limit Test as obstacles.

Commenters urge HUD to provide alternative options to protect Non-Borrowing Spouses, such as the Hold Election. One commenter suggests that HUD could satisfy the HECM by paying the lesser of the unpaid principal balance or 95% of the property's appraised value on behalf of the deceased borrower and then take a new mortgage interest due upon the Non-Borrowing Spouse's death. Another commenter recommends that HUD allow Non-Borrowing Spouses to remain in the home and pay a portion of the interest accruing on the loan based on their ability to pay; HUD would accept early assignment of the loan and defer the due and payable status of the loan so long as the Non-Borrowing Spouse pays a portion of the interest accruing on the loan and fulfills the obligations under the mortgage. Commenter also recommends that HUD allow surviving Non-Borrowing Spouses to pay money to reduce the unpaid principal balance to meet the requirements of the Principal Limit Test over time, rather than in one large, lump-sum payment; HUD would accept early assignment of the loan, defer the due and payable status of the loan and allow the surviving spouse to pay the necessary amount over a period of years.

HUD Response: As previously stated, HUD cannot interfere in private mortgage contracts. HUD also has a statutory obligation to ensure the fiscal soundness of the FHA

insurance funds, and as such, cannot ignore its fiduciary duty to the fund. HUD has provided what it believes permissible, while recognizing the sanctity of private contractual relationships and upholding its statutory obligation to ensure the fiscal soundness of the FHA insurance funds.

Additionally, as stated previously, Mortgagee Letter 2015-03 does not place restrictions or requirements on the source of funds that may be used to bring the outstanding loan balance in compliance with the Principal Limit Test, or the manner in which an outstanding loan balance may be brought into compliance with the Principal Limit Test. However, the mortgagee letter does require that the outstanding loan balance not exceed the MCA and that either the Factor Test or the Principal Limit Test is satisfied at the time of assignment.

Finally, as noted above, HECM loans are non-recourse and cannot result in a deficiency judgment against any party. A HECM foreclosure that may occur as a result of the last surviving borrower's death should not constitute a reportable event in the credit file of either the borrower's estate or the surviving Non-Borrowing Spouse.

Comment: Additional procedural protections are needed for Non-Borrowing Spouses. Commenter asserts that 90 days to obtain good, marketable title is not enough time and the proof of title that is required should be reasonable. Commenter urges HUD to make clear that marketable title is not the same thing as probate, and an opinion letter from a Title Company or a licensed attorney practicing probate law in the jurisdiction should suffice to establish "marketable" title.

HUD Response: HUD would like to confirm that Mortgagee Letter 2015-03 does not require a surviving Non-Borrowing Spouse to obtain legal title to the mortgaged property in order to qualify as an Eligible Surviving Non-Borrowing Spouse. A surviving Non-Borrowing Spouse must obtain either legal title to the mortgaged property or some other legal right to

remain within 90 days of the death of the last surviving borrower. Where a surviving Non-Borrowing Spouse is unable to obtain legal title, the surviving Non-Borrowing Spouse must be able to establish some other legal right to remain in the mortgaged property.

Comment: HUD should instruct servicers about how to communicate with surviving Non-Borrowing Spouses. Commenter notes that servicers need to improve communications with surviving Non-Borrowing Spouses, and that HUD should provide explicit instructions to servicers about how to adequately communicate with surviving Non-Borrowing Spouses.

HUD Response: HUD does not instruct servicers how to communicate. HUD would expect servicers to communicate with the representatives of deceased borrowers. HUD further expects that servicers would comply with all Federal and state laws and requirements regarding mortgage servicing, including those of the Consumer Financial Protection Bureau.

Comment: Data has not been provided to support HUD's assertion that providing the Hold Election to all surviving Non-Borrowing Spouses would be too costly. Commenters assert that HUD should provide all data, assumptions, calculations, conclusions and alternatives explored that relate to the cost of providing the Hold Election to all surviving Non-Borrowing Spouses.

HUD Response: HUD's risk analysis indicates that the Hold Election, if broadly applied to all pre-August 4, 2014, HECMs where a Non-Borrowing Spouse remains in residence after the borrower's death, would produce much more substantial losses for the insurance funds than would likely be generated by the extension of the MOE Assignment to all such HECMs. Using data from the 2010 Survey of Consumer Finances, HUD estimated that about 20% of HECM

borrowers are married to non-borrowing spouses.<sup>2</sup> On the basis of the correct data regarding HECM borrowers with non-borrowing spouses, along with data from the Centers for Disease Control to estimate life expectancies of the borrowing and non-borrowing spouses, and assuming no further cash draws after the borrowing spouse exits the home and other reasonable assumptions, HUD estimated the potential cost of the Hold Election to the insurance funds to be \$1.769 billion if it were made broadly available to all surviving, non-borrowing spouses and accepted by them. Using the same assumptions, consistently applied, HUD estimated the potential cost of the MOE Assignment to the funds to be \$439 million if it were made broadly available to all surviving, non-borrowing spouses and accepted by them. While both figures are estimates, HUD is highly confident of the order of magnitude of the difference between the two figures.

Comment: Provide notice and information to HECM borrowers and their spouses regarding the risk of displacement and their rights under the HECM statute.

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<sup>2</sup> The February 2015 Determination on Remand submitted to the District Court in the Plunkett case incorrectly stated this as “20% of the married seniors in the HECM program” being married to non-borrowing spouses; however, this was a drafting error which played no part in HUD’s actual cost calculation. That calculation was based on the assumption that 20% of all borrowers in the HECM program had non-borrowing spouses.

HUD Response: HUD appreciates the opportunity to address this concern. All mortgagee letters, including Mortgagee Letters 2015-03, 2015-02, and 2014-07, are public documents and are available to the public on HUD's website. HUD also published notices soliciting public comment on MLs 2015-03 and 2014-07 in the Federal Register, which provided additional notice of HUD's HECM policy changes related to Non-Borrowing Spouses. Finally, HUD notes that prospective HECM borrowers must receive housing counseling to be eligible for a HECM, and would like to remind current HECM borrowers and their spouses that they may speak with housing counselors at any time.

Dated: April 24, 2015

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Edward L. Golding,  
Principal Deputy Assistant Secretary for Housing

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